IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 05-cv-329-TCK-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S REPLY BRIEF IN FURTHER SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER

COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA ("the State"), and submits this reply brief in further support of its motion for an Order that it not be required to respond to the August 22, 2006 Amended First Interrogatories propounded by Defendants Cargill, Inc. ("Cargill") and Cargill Turkey Production, LLC ("Cargill Turkey"), *see* DKT #911, on the ground that the number of interrogatories greatly exceeds the number permitted under the Federal Rules of Civil Procedure.

I. Introduction

The State is seeking a protective order on the ground that Cargill and Cargill Turkey have propounded interrogatories that greatly exceed the 25 permitted under Fed. R. Civ. P. 33. In their response, Cargill and Cargill Turkey argue (1) that their interrogatories do not contain discrete subparts, despite the fact that each of the subparts can "stand alone," and (2) that the State's effort to seek judicial relief from Cargill's and Cargill Turkey's excessive number of

interrogatories by means of a protective order amounts to a "dilatory tactic." Neither of these two arguments has any merit.

II. Argument

A. The subparts in Cargill's and Cargill Turkey's interrogatories "stand alone" and therefore should be counted separately

In a case cited by both Cargill and Cargill Turkey and the State -- *Kendall v. GES Exposition Services, Inc.*, 174 F.R.D. 684 (D. Nev. 1997) -- the proper methodology for determining whether interrogatories contain discrete subparts is set forth as follows:

> Probably the best test of whether subsequent questions, within a single interrogatory, are subsumed and related, is to examine whether the first question is primary and subsequent questions are secondary to the primary question. Or, can the subsequent question stand alone? Is it independent of the first question? Genuine subparts should not be counted as separate interrogatories. However, discrete or separate questions should be counted as separate interrogatories, notwithstanding they are joined by a conjunctive word and may be related.

Kendall, 174 F.R.D. at 685-86 (emphasis added) (*cited in* Cargill / Cargill Turkey Response, p. 2; State's Motion, p. 5). Applying this methodology to the Cargill and Cargill Turkey interrogatories, it is clear that the subparts of Cargill's and Cargill Turkey's interrogatories "stand alone" and thus each subpart should be counted as separate interrogatories.[1]

For example, an examination of Cargill interrogatories 1, 2, 3, 4, 9, 10, 13, 15, 16 and 17 and Cargill Turkey interrogatories 11, 12, 13 and 14 demonstrates that Cargill and Cargill Turkey are asking separate, independent, stand-alone questions that can plainly be answered without reference to the other questions contained within the same interrogatory. Namely, the subparts seek: (1) the factual basis of the State's allegation against Cargill, (2) the factual basis of

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[1] The Local Rules set out what are arguably even more stringent rules for counting interrogatories. Specifically, LCvR33.1 provides that: "Interrogatories inquiring as to the existence, location and custodian of documents or physical evidence shall each be construed as one interrogatory. All other interrogatories, including subdivisions of one numbered interrogatory, shall be construed as separate interrogatories." (Emphasis added.)

the State's allegation against Cargill Turkey, (3) the legal basis of the State's allegation against Cargill, (4) the legal basis of the State's allegation against Cargill Turkey, (5) the identification of each witness upon whom the State will rely to establish the State's allegation against Cargill, and (6) the identification of each witness upon whom the State will rely to establish the State's allegation against Cargill Turkey.[2] Similarly, an examination of Cargill interrogatories 5, 6, 7, 8, 12 and 14 and Cargill Turkey interrogatories 15, 16, 17 and 18 demonstrates that Cargill and Cargill Turkey are asking separate, independent, stand-alone questions that can plainly be answered without reference to the other questions contained within the same interrogatory. Namely, the subparts seek: (1) the factual basis of the State's allegation against Cargill, (2) the factual basis of the State's allegation against Cargill Turkey, (3) the identification of each witness upon whom the State will rely to establish the State's allegation against Cargill, and (4) the identification of each witness upon whom the State will rely to establish the State's allegation against Cargill Turkey. Cargill and Cargill Turkey contend that "[t]here is no reasonable method to break [these] inquir[ies] into separate interrogatories." Cargill / Cargill Turkey Response, pp. 5-6. This is simply not the case. These subparts are, as demonstrated above, separate, discrete, independent, stand-alone interrogatories and should be treated as such. Cargill and Cargill Turkey simply do not want to be charged with having each of these separate, discrete,

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[2] Cargill and Cargill Turkey argue that individual interrogatories seeking information as to (1) Cargill and (2) Cargill Turkey should be treated as a single interrogatory on the ground that "[i]f Cargill and CTP each asked the very same Interrogatory, the response would likely be identical." Cargill / Cargill Turkey Brief, p. 6. The fallacy of this argument is readily apparent. One does not count interrogatories based upon the anticipated response of the answering party. Further, to take Cargill and Cargill Turkey's "logic" a step further, if interrogatories seeking information about Cargill and Cargill Turkey should be counted as a single interrogatory, then Cargill and Cargill Turkey should be treated as a single entity for purposes of counting the number of interrogatories they are permitted to propound.

independent, stand-alone subparts counted as individual interrogatories. However, the Federal Rules require that they must be so counted.[3]

Likewise, Cargill Turkey argues that its interrogatories 3 and 4 should be counted as a single interrogatory -- despite the fact that these interrogatories, too, ask about multiple, stand-alone topics. Cargill Turkey rationalizes its position as to interrogatory 3, for example, on the ground that it could have framed its interrogatory as follows: "[P]lease detail the facts upon which you base the allegation in ¶ 58 of your Amended Complaint that the listed constituents in poultry litter [sic] cause harm to the environment and pose human health risks. This must be construed as only one interrogatory." Cargill / Cargill Turkey Brief, p. 4 (emphasis added). This is incorrect. Putting aside the myriad other objections to this formulation that the State would have, Cargill Turkey's proposed alternative interrogatory is nothing more than an attempt to evade the rules on interrogatories and should not be tolerated. A proper analysis of this interrogatory results in it being either overly broad or multiple interrogatories.

It is readily apparent that Cargill and Cargill Turkey do not want to abide by the limitations set forth in the Federal Rules. Cargill's and Cargill Turkey's arguments hinge on the false construct that they must choose between either (1) serving a "primary" interrogatory which would be facially overbroad (and an attempt to evade the restrictions on the number of interrogatories) or (2) serving an interrogatory loaded up with subparts which would run afoul of

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[3] Cargill attempts to argue that were the State's approach toward counting interrogatories applied to one of its own interrogatories, the State's interrogatory would exceed the numerical limitations imposed under the Federal Rules. *See* Cargill / Cargill Turkey Response, p. 7. Cargill's and Cargill Turkey's argument is based upon an erroneous reading of the State's interrogatory. The State does not dispute that the cited interrogatory contains five discrete subparts. However, the State does dispute that a rational, reasonable, plain reading of the introductory language of the interrogatory -- "[f]or each of your poultry growing operations in the IRW since 1952" -- would require that each of the discrete subparts be multiplied by 54. The State's interrogatory merely sets a time limitation as to how far back in time the State is seeking information from Cargill and Cargill Turkey.

the limits on the number of permissible interrogatories. This is a false construct because there is a third -- and correct -- alternative: that the Federal Rules place strict, enforceable limits on the number of interrogatories a party may serve for good reason, and that, as such, Cargill and Cargill Turkey must prioritize and be selective in the information they seek to elicit by this discovery vehicle. As opposed to a net used to capture anything that it lands upon, an interrogatory is intended to be a precise discovery device used to obtain specific information.

This third alternative -- limited and selective interrogatory practice -- is wholly consistent with the explanation set forth in the Advisory Committee Notes to the 1993 Amendments to Rule 33, which instituted the limitations on the number of interrogatories a party may serve:

> The purpose of this revision is to reduce the frequency and increase the efficiency of interrogatory practice. . . . Subdivision (a). Revision of this subdivision limits interrogatory practice. Because Rule 26(a)(1)-(3) requires disclosure of much of the information previously obtained by this form of discovery, there should be less occasion to use it. Experience in over half of the district courts has confirmed that limitations on the number of interrogatories are useful and manageable. Moreover, because the device can be costly and may be used as a means of harassment, it is desirable to subject its use to the control of the court consistent with the principles stated in Rule 26(b)(2), particularly in multi-party cases where it has not been unusual for the same interrogatory to be propounded to a party by more than one of its adversaries. Each party is allowed to serve 25 interrogatories upon any other party, but must secure leave of court (or a stipulation from the opposing party) to serve a larger number. Parties cannot evade this presumptive limitation through the device of joining as "subparts" questions that seek information about discrete separate subjects.

(Emphasis added.)

The limitations on the number of permissible interrogatories have been instituted for a reason. As explained in *Duncan v. Paragon Publishing, Inc.*, 204 F.R.D. 127, 128 (S.D. Ind. 2001): "Responding to interrogatories is 'inherently expensive and burdensome.' The Rule was amended in 1993 to reduce the frequency and efficiency of interrogatory practice since the device can be costly and may be used as a means of harassment." (Citations omitted.)

Simply put, as set forth in the State's Motion for Protective Order, the interrogatories served by Cargill and Cargill Turkey contain scores of subpart questions that seek information about discrete, separate subjects. They are therefore improper. Consistent with the Federal Rules, Cargill and Cargill Turkey need to ration the use of their allotted interrogatories to those items of information upon which they place the greatest priority (and for which interrogatories are the appropriate discovery vehicle[4]). Unless and until Cargill and Cargill Turkey do so, the State should be relieved of its obligation to respond.

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[4] Although not directly at issue here, it is nonetheless informative to note that Cargill and Cargill Turkey admit that a large number of their interrogatories are contention interrogatories seeking information about certain allegations in the State's First Amended Complaint. Such contention interrogatories are improper, and the State will object as such if and when it is required to respond to one or more of them. *See, e.g., Hiskett v. Wal-Mart Stores, Inc.*, 180 F.R.D. 403 (D. Kan. 1998) ("Interrogatories should not require the answering party to provide a narrative account of its case. They should not duplicate initial disclosures. The court will generally find them overly broad and unduly burdensome on their face to the extent they ask for 'every fact' which supports identified allegations or defenses") (citations omitted); *In re Convergent Technologies Securities Litigation*, 108 F.R.D. 328 (N.D. Cal. 1985) ("[T]here is substantial reason to believe that the early knee jerk filing of sets of contention interrogatories that systematically track all the allegations in an opposing party's pleadings is a serious form of discovery abuse. Such comprehensive sets of contention interrogatories can be almost mindlessly generated, can be used to impose great burdens on opponents, and can generate a great deal of counterproductive friction between parties and counsel. Moreover, at least in cases where defendants presumably have access to most of the evidence about their own behavior, it is not at all clear that forcing plaintiffs to answer these kinds of questions, early in the pretrial period, is sufficiently likely to be productive to justify the burden that responding can entail") (emphasis in original); Fed. R. Civ. P. 33(c) ("An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time). Cargill and Cargill Turkey would nonetheless posit that the State must lodge substantive objections to discovery that procedurally should never have been served. For Cargill and Cargill Turkey to characterize the State's reservation of its right to raise its substantive objections at the appropriate time (i.e., when a set of interrogatories that complies with the procedural numerical limitations set forth in Rule 33 is served) a "dilatory tactic" is therefore unfounded and inappropriate. It is Cargill and Cargill Turkey's refusal to adhere to the Federal Rules that is precipitating the delay.

B. A motion for protective order is the proper procedural vehicle for obtaining relief from Cargill's and Cargill Turkey's excessive number of interrogatories

Allegations by Cargill and Cargill Turkey that the State is being dilatory by being up-front about its objections to the number of interrogatories are wholly without merit.[5] *See* Cargill / Cargill Turkey Response, pp. 7-9. Had the State itself selected the 25 interrogatories it wished to respond to and objected to the remainder, Cargill and Cargill Turkey would no doubt have cried foul. The State can hardly be faulted for, before undertaking the considerable time and expense involved in responding to the discovery, seeking guidance as to which interrogatories it actually is required to answer.

A protective order is the proper procedural vehicle for so doing. *See, e.g., Herdlein Technologies, Inc. v. Century Contractors, Inc.*, 147 F.R.D. 103, 104-05 (W.D.N.C. 1993). Cargill and Cargill Turkey incorrectly characterize this as an "obscure view," and then proceed to quote *Capacchione v. Charlotte-Mecklenburg Board of Education*, 182 F.R.D. 486, 492 fn 4 (W.D.N.C. 1998), as follows: "the responding party's best course for adequately preserving its objections to supernumerary interrogatories is to answer up to the numerical limit and object to the remainder without answering." In quoting *Capacchione*, however, Cargill and Cargill Turkey inexplicably omit the opening clause of this quote, which dramatically changes its meaning and shows that *Capacchione* actually supports the propriety of the procedural course taken by the State. The quote in its entirety reads as follows: "In the absence of a protective

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[5] It is indeed disturbing the willingness that the Poultry Integrator Defendants are so easily willing to ascribe improper motives to the State's positions. *See, e.g., Pancoast v. Eldridge*, 259 P. 863 (Okla. 1927) ("'A brief in no case can be used as a vehicle for the conveyance of hatred, contempt, insult, disrespect, or professional discourtesy of any nature for the court of review, the trial judge, or opposing counsel'") (citation omitted). Such allegations merely demonstrate the weakness of the Poultry Integrator Defendants' positions. In any event, the State is entitled, just as are the Poultry Integrator Defendants, to raise legitimate objections.

order, the responding party's best course for adequately preserving its objections to supernumerary interrogatories is to answer up to the numerical limit and object to the remainder without answering." *Capacchione*, 182 F.R.D. at 492 fn 4 (emphasis added). Indeed, *Capacchione* cites *Herdlein* with approval: "'The responding party must object (to the Court) to the number of interrogatories before responding in order to rely on this rule.' *Herdlein*, 147 F.R.D. at 104 (emphasis added)." *Capacchione*, 182 F.R.D. at 492. The *Capacchione / Herdlein* protective order approach is by no means unique, and has in fact been referenced within this Circuit. *See, e.g., Casson Construction Co., Inc. v. Armco Steel Corp.*, 91 F.R.D. 376, 377-78 (D. Kan. 1980) ("Local Rule 17(d) [which "provides that no party shall serve more than thirty interrogatories without leave of court"] is an attempt to avoid burdensome interrogatories. The proper response from a party faced with burdensome interrogatories is a motion for protective order pursuant to Federal Rule of Civil Procedure 26(c)"). Accordingly, no further response to the Cargill and Cargill Turkey interrogatories is required or appropriate until the Court rules on the State's Motion for Protective Order. The delay that is incident to the resolution of the State's Motion for Protective Order is occasioned entirely by the fact that Cargill and Cargill Turkey propounded an excessive number of interrogatories.

III. Conclusion

WHEREFORE, premises considered, the State requests that the Court enter a protective order pursuant to Federal Rule of Civil Procedure 26(c), providing that discovery not be had, for the reason that the number of interrogatories propounded by Cargill and Cargill Turkey on August 22, 2006, together with their discrete subparts, exceeds the number allowed under Rule 33(a).

Respectfully Submitted,

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